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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1052

NORMA MOONEY, *Petitioner*

v.

STAINLESS, INC., et al, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	9
Conclusion	28
Appendices	1a, 16a

CITATIONS

CASES:

Alaska Packers Ass'n. v. Industrial Acc. Comm., 294 U.S. 532	21
Allen v. Matson Navigation Co., 255 F.2d 273	12
Arnett v. Fuston, 378 S.W.2d 425	13
Atlantic Coast Line R. Co. v. Swafford, 220 F.2d 901, *rev'd*, 350 U.S. 807	10
Beacon Theatres v. Westover, 359 U.S. 500	9
Billings v. Dugger, 362 S.W.2d 49	24
Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525	9
California Fruit Exchange v. Henry, 89 F.Supp. 580 (W.D. Pa. 1950), aff'd, 184 F.2d 517	27
Carolina Life Ins. Co. v. Williams, 210 F.2d 477, rev'd, 348 U.S. 802	10
Carroll v. Lanza, 349 U.S. 408	21
Cawthon v. Mayo, 325 S.W.2d 629	13
Commercial Ins. Co. v. Young, 354 S.W.2d 779	20
Craig Funeral Home v. State Farm Mut. Auto Ins. Co., 280 F.2d 337	17
Crider v. Zurich Ins. Co., 85 S.Ct. 769	21
Dairy Queen v. Wood, 369 U.S. 469	9
Davis v. United States Fid. & Guar. Co., 337 S.W.2d 240	20

Page

Dawson Brothers and Beaver v. Petersen, 11 Tenn. App. 167 20
DeGarmo v. City of Alcoa, 332 F.2d 403 14
Dick v. New York Life Ins. Co., 359 U.S. 437 ...11, 12, 14, 17
Dimick v. Schiedt, 293 U.S. 474 9
Dryfoos v. Scavenger Service Corp., 115 F.2d 637 19
Eastern Air Lines v. Union Trust Co., 221 F.2d 62, rev'd, 350 U.S. 907 10
Erie R. Co. v. Tompkins, 304 U.S. 64 .....2, 12, 14
Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521 .....9, 10
Foster v. Moore-McCormack Lines, Inc., 131 F.2d 907 27
Galloway v. United States, 319 U.S. 372 11
Greene v. Werven, 275 F.2d 134 12
Hanson v. Ford Motor Co., 270 F.2d 586 12
Harris v. Pennsylvania R. Co., 361 U.S. 15 9
Herron v. Southern Pac. Co., 283 U.S. 91 9
Hobbs v. Livesay, 372 S.W.2d 199 13
Hudgins v. Nashville Bridge Co., 113 S.W.2d 738 20
Improvement Co. v. Munson, 14 Wall. 442 16
Jacob v. New York City, 315 U.S. 752 11
Land O'Lake Creameries, Inc. v. Hungerholt, 319 F.2d 352 17
Lind v. Schenley Indus., Inc., 278 F. 2d 79 12
Lowe v. Irvin, 373 S.W.2d 623 13
Mercer v. Theriot, 377 U.S. 152 11
Mid-South Pavers, Inc. v. Whitaker, 385 S.W.2d 284 .. 13
Myers v. Reading Co., 331 U.S. 477 17
Pacific Employers Ins. Co. v. Industrial Acc. Comm., 306 U.S. 493 21
Phillips Petroleum Co. v. Gibson, 232 F.2d 13 (5th Cir. 1956), rev'd, 352 U.S. 874 10
Poague v. Great Atlantic & Pac. Tea Co., 242 F.2d 575 12
Price v. Firestone Tire & Rubber Co., 321 F.2d 725 ... 14
Rogers v. Missouri Pac. R. Co., 352 U.S. 500 .....9, 10
Royal Indemnity Co. v. Curtis, 256 F.2d 329 12
Rose & Co. v. Snyder, 206 S.W.2d 897 .....13, 24
Schroader v. Rural Educ. Ass'n, 228 S.W.2d 491 20
Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107 9
Simler v. Conner, 372 U.S. 221 9

Page

Shipley v. Wellwood Silk Throwing Mills, 47 S.W.2d 561 20
Smart v. Embry, 348 S.W.2d 322 24
Sypherd v. Haeckl's Express, Inc., 341 F.2d 65 14

STATUTES:

Illinois Revised Statutes,
Section 138.5(a) 19a
Section 138.5(b) 20a

Tennessee Code Annotated:
Section 50-902 ..... 16a
Section 50-908 ..... 16a
Section 50-914 ..... 16a
Section 50-1205 ..... 16a
Section 50-1206 ..... 18a

MISCELLANEOUS:

Annotation, FELA—Sufficiency of Evidence, 4 L.Ed. 2d 1787 9
1 Larson's, Workmen's Compensation Law 24
5 Moore's Federal Practice (2d ed 1951) 11

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on July 13, 1964.

CITATIONS TO OPINIONS BELOW

The initial opinion of the Court of Appeals and the court's opinion denying rehearing are reported at 338 F.2d 127 (6th Cir. 1964). They are reproduced herein as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on July 13, 1964. Petitioner thereafter filed a timely petition for rehearing, which was denied on November 12, 1964. Mr. Justice Stewart entered an order on February 3, 1965 granting petitioner's motion for extension of time within which to file a petition for certiorari to and including April 10, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the determination by the Court of Appeals that there was not sufficient evidence to submit to the jury petitioner's theory that respondent was negligent in hiring an incompetent independent contractor deprived petitioner of her constitutional right to a jury trial of the evidentiary facts, where the trial court had determined that there was such sufficient evidence and where the jury found, by way of general verdict, that the respondent was in fact negligent; and whether the Court of Appeals erred in failing to apply Tennessee law on the question of what constituted "sufficient evidence," in contravention of the rule of *Erie R. Co.* v. *Tompkins,* 304 U.S. 64.

2. Whether the Court of Appeals erred in reversing the trial-court-approved general verdict, substituting its opinion for the verdict of the jury on the question of whether an employer-employee relationship existed between respondent and its subcontractor when, assuming the establishment of the existence of such relationship, respondent would be liable to petitioner for common law damages under Tennessee law as a non-complying employer which rejected Tennessee's Workmen's Compensation Act; and whether such action deprived petitioner of her constitutional right to trial by jury.

STATUTES INVOLVED

The Tennessee and Illinois Statutes involved are printed, *infra*, as Appendix B at 16a.

STATEMENT OF THE CASE

Petitioner's husband, Harley W. Mooney, was killed after being catapulted off the top of a 150-foot steel tower, while he was assisting in the erection of such tower at Oak Ridge, Tennessee. The Atomic Energy Commission had engaged the H. K. Ferguson Company, one of the prime contractors at Oak Ridge, to furnish and erect three 150-foot steel towers. Ferguson prepared the tower bases and solicited bids from others, including one Stainless, Inc., for the fabrication and erection of the towers. (R. 99-100a; 256-57a).

Stainless, a Pennsylvania corporation, was successful in its bid for fabrication; subsequently Ferguson requested Stainless to also undertake erection of these towers. Stainless operated a subsidiary, Stainless Construction Company, which handled field details with respect to the erection of the towers designed and fabricated by Stainless, Inc. Although styled as a "construction" company, Stainless Construction Company actually was essentially a "paper" corporation, whose principal purpose was, whenever the purchaser so requested, to see to the erection of towers sold by the parent, Stainless, Inc. It generally accomplished this purpose by "subcontracting" out the actual construction work. (R. 276-77a; 300a). The two corporations were treated as one defendant in this litigation.

The initial bid of Stainless for fabrication of the towers was $4,500. After Ferguson requested erection in addition to fabrication, Stainless Construction Com-

pany obtained oral bids from two tower erectors. William Wood, doing business as Central Illinois Tower Maintenance Company, a sole proprietorship of Monticello, Illinois, proposed to do the work for $3,000, which bid he made over long-distance telephone without ever having seen any plans or details of the towers or the physical location where they were to be erected, evidently basing his bid primarily upon the information that there were three 150-foot towers to be erected at Oak Ridge, Tennessee. (R. 279a). This bid was $1,575 lower than the only other bid received. (R. 281a). Stainless then submitted a bid of $9,430 to Ferguson for fabrication and erection of the towers, which was accepted. Stainless fabricated the towers and engaged Wood to erect them for the $3,000.

Mooney was an employee of Wood and, like Wood, a resident of Illinois. Wood, Mooney, and another individual who had been working for Wood proceeded to Oak Ridge at a prearranged time, their arrival coinciding approximately with that of the fabricated towers from Stainless in Pennsylvania. (R. 204a.). Erection of two of the towers was completed without incident. However, Mooney was fatally injured during the erection of the top section of the third tower. At the time of the fatal accident, Wood was operating a pickup truck with a block and tackle arrangement attached to the rear. (R. 79a). Erection of the tower was accomplished with the aid of a "gin pole"[1] which was continually raised higher as the work progressed toward completion with the addition of each twenty-

[1] "An apparatus for hoisting heavy weights; now usually a tripod, with a winch or drum round which the rope is wound." Oxford Universal Dictionary, 793 (3rd ed.).

foot section. As one of Wood's other employees who witnessed the accident described the arrangement:

> This gin pole fastened to the top of the tower and projected away on up in the air and a snatch block on the top of this gin pole with the bull line, [rope] we call it, back down to the ground, and the other end of the bull line came down the tower and through a snatch block at the base of the tower and then the bull line went through a snatch block there at the base out 100 feet, or something like that, to a pine tree sitting on a bank, and a snatch block at the base of that tree, and then the bull line went to a pickup truck which was headed down a very, very steep hill . . . imbedded with coarse rock . . . twelve inches or deeper on this grade. . . . So they tied the end of this bull line that come through the snatch block from the gin pole to the section of the tower which they were erecting.
>
> * * *
>
> Well, they tied the bull line to the section of the tower, tied the bull line out here from the pine tree to the pickup truck which was headed down the hill . . . he [Wood] goes down this steep hill quite a ways. I don't know how many feet, but quite a little ways . . . the tower, it was going up, of course, and it got up to where it was to be connected to the part that was already erected . . . [then] these men, . . . climbed the tower and bolted it together. . . . And these men on the—he had a loudspeaker on the pickup, and he hollered to them a time or two, and they says, "all right, slack off, slack off. . . ." So he started backing up through these loose gravels. He backed up a few feet and went ahead just a little bit, then he backed up and he must have come back about eight or ten feet the second time, then he started ahead. Therefore, I don't know just what happened, but he just kept going and that tightened up the bull line to the

> steel again and the tower began to sway like this (indicating). It did that four or five times. Of course, those men were hollering bloody murder, and I was hollering the same, trying to get him to stop.
>
> Whether his foot slipped off the brake, or whether he hit the foot feed there which caused him to keep going, I couldn't say. But, anyway, the tower went just like this, and then it broke in two up quite a ways. I don't know exactly how far up in the air, how far up it was it broke, but it came to the ground, and this Mooney, he went sailing through the air just like a big crow. He just sailed through the air and landed about 150 feet away down the side of the hill. (R. 78a-82a).

After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner recovered a $50,000 judgment against Stainless, Inc. for the wrongful death of her husband.[2] Petitioner maintained two alternative theories before the trial court: (1) that Wood was an employee of Stainless, and Stainless was chargeable with Wood's negligence under the doctrine of *respondeat superior;* and (2) that if Wood was an independent contractor, Stainless was negligent in hiring an incompetent tower erecter. Both theories were submitted to the jury, and a general verdict was returned in favor of petitioner. Respondent's timely motions for a directed verdict (R. 193a)

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[2] Petitioner had recovered a $35,000 jury verdict against Stainless in a previous trial. The trial judge set aside the judgment, however, on respondent's motion for a new trial for the reason that the judge felt he might have been in error in submitting to the jury, in addition to petitioner's two theories herein considered, the theory that erecting towers was an extra-hazardous activity and Stainless had a non-delegable duty to see to the safety of the workers.

and judgment not withstanding the verdict (R. 43a) and in the alternative for a new trial were denied because the trial court determined there was sufficient evidence to go to the jury on both of petitioner's theories of liability.

The Court of Appeals for the Sixth Circuit reversed the jury determination, finding that even if Wood was an employee of Stainless, the fact that Wood had complied with the Illinois Workmen's Compensation Act, and the fact that Wood's carrier had voluntarily begun payments to Mooney's widow, would bar petitioner from a common law suit in Tennessee. (App. A. at 3-4a). The court further found error in the trial court's submission to the jury of the question of the negligence of Stainless in hiring an incompetent subcontractor. (App. A at 7a).

The court denied petitioner's timely petition for rehearing, although in so doing it modified somewhat its original decision. Petitioner maintained in its petition for rehearing that the Illinois law would not shelter Stainless if it was the employer of Wood, since Stainless had failed to file certificates of Workmen's Compensation Insurance with the State of Tennessee, and therefore was amenable to a common law damage suit as an employer which had "rejected" the Tennessee Act. In response, the court stated that Stainless did not have to comply with the Tennessee Act unless it had five employees working in Tennessee, and Stainless could only have five employees in Tennessee if Wood were considered the employee of Stainless. (App. A at 12a). Although the jury had, by way of general verdict, determined the existence of such relationship, the Court of Appeals *reweighed* the evidence for itself, in effect trying the issue *de novo,* and found that "these

facts do not establish that the relationship of employer-employee existed between Stainless and Wood." (App. A at 12a). Significantly, the Court did not phrase the issue as being one of the sufficiency of the evidence to go to the jury.

With respect to her second theory, petitioner argued that the Court of Appeals erred in its determination that it was error for the trial court to submit to the jury petitioner's theory of the negligence of Stainless in engaging an incompetent contractor, for the reason that there was sufficient, material evidence that Wood did not have the proper equipment to do this job and that respondent was negligent in hiring him.

Petitioner further argued that the court had erred in sitting as a "thirteenth juror" and in deciding the issue on the "preponderance of the evidence," a function solely within the province of the jury. The court rejected petitioner's argument, maintaining that petitioner had misinterpreted its original opinion, wherein it had stated, after cataloging some of the evidence on the issue:

> In light of the above, we are of the opinion that plaintiff failed to carry her burden of proof, and there was not sufficient evidence of Wood's alleged incompetence to submit to the jury the question of whether Stainless was negligent in selecting him. (App. A. at 7a).

However, the court modified its first opinion to conform to its rehearing rationalization, *i.e.*, by striking the words "plaintiff failed to carry her burden of proof" from the sentence quoted above. (App. A. at 15a).

REASONS FOR GRANTING THE WRIT

I.

This Court has been increasingly vigilant in recent years in preserving to litigants their Seventh-Amendment-guaranteed right to a jury trial in federal cases. "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Beacon Theatres* v. *Westover,* 359 U.S. 500, 501, quoting *Dimick* v. *Schiedt,* 293 U.S. 474, 486. See also *Dairy Queen* v. *Wood,* 369 U.S. 469. The Court has described the function assigned to the jury as "an essential factor in the process for which the Federal Constitution provides." *Byrd* v. *Blue Ridge Rural Elec. Coop.,* 356 U.S. 525, 539, quoting *Herron* v. *Southern Pac. Co.,* 283 U.S. 91, 95. See also *Simler* v. *Conner,* 372 U.S. 221.

Perhaps the most outstanding manifestation of the Court's concern for preserving this right has been its frequent review of sufficiency-of-the-evidence cases under the Federal Employers' Liability Act. Cognizant of its duty to effectuate the intention of the Congress that litigants should have a right to a jury determination under the Act, this Court has been vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of such determination. *E.g., Harris* v. *Pennsylvania R. Co.,* 361 U.S. 15, 20 (citing cases); *Rogers* v. *Missouri Pac. R. Co.,* 352 U.S. 500. See generally Anno: FELA—Sufficiency of Evidence, 4 L ed 2d 1787. The Court has been equally solicitous in preserving this right to litigants under the Jones Act. *E.g., Sentilles* v. *Inter-Caribbean Shipping Corp.,* 361 U.S. 107; *Ferguson* v.

Moore-McCormack Lines, Inc., 352 U.S. 521, 549 (citing FELA cases).

The Court's concern for protection of the right to jury determination of factual questions under these Federal statutes has led to conjecture as to whether the same policy might also extend to personal injury cases in the Federal courts on diversity jurisdiction. *Rogers* v. *Missouri Pac. R. Co., supra* at 542 (Frankfurter, dissenting). Indeed, it would appear that, although utilizing the power sparingly, the Court has in fact reviewed sufficiency-of-the-evidence determinations of lower federal courts in non-FELA or Jones Act cases. *Phillips Petroleum Co.* v. *Gibson,* 232 F.2d 13 (5th Cir. 1956), reversed at 352 U.S. 874 (Per curiam); *Eastern Air Lines, Inc.* v. *Union Trust Co.,* 221 F.2d 62 (D.C. Cir 1955), reversed at 350 U.S. 907 (Per curiam); *Atlantic Coast Line R. Co.* v. *Swafford,* 220 F.2d 901 (5th Cir. 1955), reversed at 350 U.S. 807 (Per curiam); *Carolina Life Ins. Co.* v. *Williams,* 210 F.2d 477 (5th Cir. 1954), reversed at 348 U.S. 802 (Per curiam).

The instant case, stripped to its barest essentials, brings to this Court a forthright sufficiency-of-the-evidence question on the issue of negligence in a federal diversity personal injury action. Nonetheless it is an important case. It is important to petitioner because she has been the victim of a gross injustice, which fairly cries out to be redressed.[3] It is important to this

[3] By reason of the action of the court below in reversing the jury verdict of $50,000, petitioner has been relegated to compensation payments of $46.00 per week for a maximum of six years (so long as she does not die or remarry). She has been forced to take a job as a steel drill press operator, in order to support herself and her seven-year-old son. (R. 67a).

Court and the whole Federal court system because it might perhaps serve as a suitable vehicle for this Court to settle the question of what standard—state or Federal—is to be utilized in determining the sufficiency of the evidence to go to the jury where Federal jurisdiction is based upon diversity of citizenship. See *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437; *Mercer* v. *Theriot*, 377 U.S. 152. It is important in another respect—it arrests one's attention on the fact that yet another jury determination has been set aside by a reviewing court, thereby contributing to the subtle erosion of this constitutionally guaranteed right. This decision "marks a continuation of the gradual process of judicial erosion which in one-hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." *Galloway* v. *United States*, 319 U.S. 372, 397 (Black, dissenting). The erosion is perhaps imperceptible when viewed from the point of view of a single case; yet when assessed from the perspective of years, and hundreds of cases, it is apparent that incursions have been made into the guarantees of the Seventh Amendment, and that this Court's repeated admonishments that factual questions are for the jury have not been heeded. See, *e.g.*, *Jacob* v. *New York City*, 315 U.S. 752. This case presents the Court with a suitable opportunity to dam up this erosion and again secure to litigants their rights insured under our Constitution.

Whether a state or Federal standard determines the sufficiency of the evidence to support a jury verdict in cases in the District Courts where jurisdiction is based on diversity of citizenship is still an open question. *Mercer* v. *Theriot*, *supra* at 156. (Harlan, dissenting). See 5 Moore's Federal Practice (2d ed 1951) §38.10.

A determination by a Federal court which conflicts with applicable state law in this important area raises grave implications under the doctrine enunciated in *Erie R. Co.* v. *Tompkins,* 304 U.S. 64. Lower Federal courts have recognized and considered this problem, but their decisions are not harmonious and lend little guidance on the question. *Hanson* v. *Ford Motor Company,* 270 F.2d 586 (8th Cir. 1960); *Lind* v. *Schenley Indus., Inc.,* 278 F.2d 79 (8th Cir. 1960); *Greene* v. *Werven,* 275 F.2d 134 (8th Cir. 1960). (Applying state standard or reserving question.) *Royal Indemnity Co.* v. *Curtis,* 256 F.2d 329 (5th Cir. 1958); *Allen* v. *Matson Navigation Co.,* 255 F.2d 273 (2d Cir. 1958); *Poague* v. *Great Atlantic & Pacific Tea Co.,* 242 F.2d 575 (5th Cir. 1957). (Applying federal standard.) Although this question may be "lurking in this case" much as it was in *Dick* v. *New York Life Ins. Co., supra* at 444, in the sense that it was not acknowledged by the court below, the question is here presented if this Court is now disposed to decide it.

Laying aside the fact that the Sixth Circuit committed grave error in this case, *the outstanding failure in its opinion is that it does not articulate precisely what standard, state or Federal, settled or novel, it is utilizing in determining the sufficiency of the evidence to go to the jury on either of petitioner's theories.* The court simply lays out some of the evidence on petitioner's theories, weighs the evidence, decides which preponderates, and then declares that, at least with respect to the second theory, there was not sufficient evidence to go to the jury. In order to properly assess the merits of this petition it is necessary to examine the applicable Tennessee law, the evidence in the case,

and the treatment of the question on review by the Court of Appeals. We look first to the question of the sufficiency of the evidence to submit to the jury petitioner's theory that respondent was negligent in hiring an incompetent subcontractor.

The standard to be applied by Tennessee courts on this question has been stated by the Tennessee Supreme Court thus:

> While these issues involve a review of the evidence, such review is not to determine where the truth lies or to find the facts, that not being our province in jury cases. It is only to determine whether there was any substantial evidence to support the verdict; and it must be governed by the rule, safeguarding the constitutional right of trial by jury, which requires us to take the strongest legitimate view of all the evidence to uphold the verdict, to assume the truth of all that tends to support it, to discard all to the contrary, and to allow all reasonable inferences to sustain the verdict. *Rose & Co.* v. *Snyder,* 185 Tenn. 499, 508, 206 S.W.2d 897, 901 (1947). See also *Mid-South Pavers, Inc.* v. *Whitaker,* 385 S.W.2d 284 (1964), *cert den.,* Jan. 6, 1965; *Arnett* v. *Fuston,* 378 S.W.2d 425 (1963), *cert. den.,* March 5, 1964; *Lowe* v. *Irvin,* 373 S.W.2d 623 (1963), *cert. den.,* June 4, 1963; *Hobbs* v. *Livesay,* 372 S.W.2d 199 (1963), *cert. den.,* July 15, 1963; *Cawthon* v. *Mayo,* 325 S.W.2d 629 (1959), *cert. den.,* June 5, 1959. (*cert. den.* refers to Tennessee Supreme Court.)

As we have said, it is impossible to tell exactly what standard the Sixth Circuit was following. It is apparent, however, that it was not applying the standard which governs this question in Tennessee State courts, even though it did not allude to the fact that it was not

applying Tennessee law. The court's silence on this question stands in marked contrast to its recent treatment of this "sufficiency" question in a diversity action emanating from the United States District Court for the Southern Division of Ohio, *Sypherd* v. *Haeckl's Express, Inc.*, 341 F.2d 65 (6th Cir. 1965), and its treatment of this issue in a Tennessee case decided prior to the instant case, *DeGarmo* v. *City of Alcoa*, 332 F.2d 403 (6th Cir. 1964). In *Sypherd* the Sixth Circuit specifically alluded to the fact that it was following the Ohio standard on this question. Likewise, in *DeGarmo* the court recognized the necessity for applying Tennessee law. However, one searches in vain the opinion of the Sixth Circuit in the instant case for even verbal recognition of the Tennessee law, let alone adherence to such law. Further, the court did not even articulate what Federal standard it was applying, if it was in fact applying a Federal standard. The court's opinion thus limps from the start.

The confusion inherent in the Court of Appeals' decision in the instant case is further compounded when one considers the Sixth Circuit's disposition of a "sufficiency" question in *Price* v. *Firestone Tire and Rubber Co.*, 321 F.2d 725 (6th Cir. 1963). In *Price* the court specifically recognized the problem reserved by this Court in *Dick* v. *New York Life Ins. Co.* and the significance of the question in light of *Erie R. Co.* v. *Tompkins*. Recognizing that under *Erie* the substantive law of Tennessee would control, the court in effect reserved the question, in deference to this Court's disposition of *Dick*, for the reason that it did not feel that there was any material difference in the Tennessee and Federal standard. Under the Sixth Circuit's dis-

position of the instant case, however, it is apparent that these standards cannot in fact be substantially the same since it is clear that petitioner's evidence meets the Tennessee standard. This fact is readily apparent upon examination of the evidence of record.

1. There was evidence Wood's previous experience had been that of a mere employee and crew chief in the maintenance of towers. (R. 204a; 259-60a). In fact, the name of Wood's company was the Central Illinois Tower *Maintenance* Company. (Emphasis added.) There was no *reliable* evidence in the record that Wood had ever erected towers on his own before.

2. There was evidence that Wood traveled to Pennsylvania about six months prior to his being hired for this job in order to solicit business from Stainless. (R. 196a). He told Stainless at that time that he had three winch trucks, a pickup truck, rope and cable and block, and monkey wrenches (R. 197a). Stainless told Wood that if he wanted any of their work he would have to do it cheaply, or as put by Stainless' representative, he would have to "keep his pencil sharp" in making his bids (R. 283a). Wood's bid was actually more than one-third lower than the other bid, and Stainless increased its original bid for fabrication by an amount almost equal to the bid of the other bidder. Stainless told Wood that they did not make any money on erection, that they were only interested in making money on the towers. (R. 238a).

3. The Deputy Project Manager at Oak Ridge for the H. K. Ferguson Company, one of the country's largest contractors, testified that in his twenty years in the construction business he had never seen a tower erected using the type of equipment utilized by Wood (R. 180a). A committee of the Atomic Energy Commission which investigated the accident ascribed as the first of five causes of

the accident the "use of a pickup truck as the source of power for the hoisting operations. (R. 179a). Wood testified "we were using a 1959 Ford pickup truck, three-quarter ton truck" to erect the towers; that the truck did not have an emergency brake (R. 216a); and, after the accident, he had to rent a winch truck in order to complete the erection of the tower. (R. 244).

4. Wood was engaged by long-distance telephone without benefit of having seen the plans or specifications for erection of the towers, and without any information as to the topography of the area where the tower was to be erected. (R. 219a). Wood testified himself that he knew only "vaguely" what the work entailed (R. 198a), and that Stainless only vaguely described the work to him. (R. 230a).

The question is, does the above-listed evidence, considered according to the standard of *Rose & Co.* v. *Snyder* laid out *supra,* p. 13, constitute sufficient evidence to go to the jury on the issue of whether Stainless knew, or by the exercise of reasonable care might have ascertained, that Wood did not have the proper equipment to erect these towers, and was thus an incompetent independent contractor? The Sixth Circuit says not; petitioner respectfully submits that in so saying it committed fundamental error, redressible only by this Court.

Short-hand formulations of the "sufficient evidence" rule by Federal courts are as numerous as the cases dealing with the question. The court must determine "not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it." *Improvement Co.* v. *Munson,* 14 Wall. 442, 448. "The requirement is for probative facts capable of supporting, with

reason, the conclusion expressed in the verdict." *Myers* v. *Reading Co.*, 331 U.S. 477, 485. Courts of appeals have frequently recognized this Court's admonishment to leave the resolution of issues of fact to the jury, not to try the case *de novo*, or sit as a "thirteenth juror," or substitute their judgment for that of the fact finder. See, *e.g.*, *Craig Funeral Home* v. *State Farm Mut. Auto Ins. Co.*, 280 F.2d 337 (5th Cir. 1960); *Land O'Lake Creameries, Inc.* v. *Hungerholt*, 319 F.2d 352 (8th Cir. 1963). Further, a certain deference is to be paid the opinion of the District judge, "who was intimately concerned with the trial [here both trials] and who has a first-hand knowledge of the applicable state principles, [and who] believed that the case should go to the jury." *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 447. This statement is especially true where, as here, the trial judge, Robert L. Taylor, was a man of long experience in jury trial cases, and a highly respected jurist.

While the general principles culled from both state and Federal pronouncements on the question are instructive as a touchstone for courts in considering this question, the decision ultimately must be made on the basis of the facts of each particular case. Petitioner has set out the evidence she believes to be sufficient to take this question to the jury. Giving petitioner the benefit of every reasonable, favorable inference to which she is entitled by law, manifestly there was sufficient, material evidence upon which the jury could and did find Stainless negligent. Certainly, on the basis of the record evidence cataloged, *supra*, pp. 15-16, the jury could reasonably have found that Wood, by virtue of his wholly inadequate equipment, his lack of experience in tower erecting, and his entire "marginal" existence as a tower erecter was incompetent to erect these towers. The jury could have further found that Stain-

less, in attempting to maximize its profits in this venture, had been negligent in hiring Wood in the manner it did and in failing to inquire more fully into whether Wood actually had the experience, and more importantly, the proper equipment, to erect these towers. Considered under any standard, this should have been sufficient evidence to take petitioner's case to the jury.

The Court of Appeals stated, wholly gratuitously since under its disposition of the case it did not have to reach the question, that under the Restatement of Torts, Section 411, comment *b*, Stainless would not be liable even if Wood was incompetent, because this was an isolated act of negligence and Stainless could not be expected to have knowledge prior to hiring Wood that at some future time he would, by lack of attention or diligence, move the truck forward instead of backward. While this may be generally true, it was wholly irrelevant to a determination of the issue before the court. It is entirely reasonable to infer from the jury's verdict and the evidence in the record that Wood's incompetence lay not in this isolated act of going forward instead of backward, but rather the use at all of a three-quarter ton pickup truck to erect a 150-foot tower where the truck could only be used effectively as a power implement by having the truck move farther and farther away from the site of the tower, down a steep hill approximately 300 feet away from the tower (R. 246a), using a power source which by its very nature required assemblage of an intricate pulley system utilizing numerous blocks and a pine tree in order to generate the requisite power and leverage. The jury could have determined (again, giving petitioner the benefit of every reasonable inference) that Stainless was negligent in failing to inquire into what power source Wood intended to use for this job,

especially in view of the fact that this particular job was not a normal tower erection since the top section had a 480-pound beam across it which made it entirely unlike the erection of a normal 150-foot steel tower. (R. 180a).

It is submitted that the conclusion is inescapable that the Sixth Circuit Court of Appeals simply disagreed with the result reached by the jury on this question and substituted its judgment for that of the jury by going back and reweighing the evidence (App. A at 6-7a), not in the light most favorable to petitioner, but rather in a grudging, illiberal manner. In so doing the Sixth Circuit committed fundamental error. "Even though [a Court of Appeals] may disagree with the result reached by the jury we have no right to substitute our judgment for theirs on this question of fact." *Dryfoos* v. *Scavenger Service Corp.*, 115 F.2d 637, 640 (7th Cir. 1940).

II

The trial judge submitted to the jury petitioner's alternative theory that Wood was an employee of Stainless and that Stainless was chargeable with Wood's negligence under the doctrine of *respondeat superior*. As noted, *supra*, the jury returned a general verdict in favor of petitioner. In its first opinion, the Court of Appeals did not question the jury determination that the employer-employee relationship existed. Rather, it hypothesized that if Wood was in fact an employee of Stainless, petitioner's recovery of workmen's compensation from Wood's Illinois carrier, even though made voluntarily by such carrier, would bar a common law damage suit against Stainless since the law and policy of Illinois and Tennessee were in accord that recovery of workmen's compensation was the

exclusive remedy under both acts and Tennessee would recognize the payments made pursuant to the Illinois law. (App. A. at 3-4a). Under this theory, Stainless would stand in the shoes of its employee Wood and be sheltered by the Illinois Act.

In so deciding, the Sixth Circuit wholly ignored settled Tennessee law holding that an employer who was required to comply with the Tennesse Act, but who had failed to do so, was amenable to either a common law damage suit or workmen's compensation recovery, and that the employee could elect to pursue either of these remedies. *Commercial Ins. Co.* v. *Young,* 290 Tenn. 608, 354 S.W.2d 779 (1962); *Schroader* v. *Rural Educ. Ass'n.,* 33 Tenn. App. 36, 228 S.W.2d 491 (1950); *Dawson Brothers and Beaver* v. *Petersen,* 11 Tenn. App. 167. Further, under the Tennessee Compensation Act, the employee's election to pursue a workmen's compensation remedy does not become irrevocable, so as to preclude him from prosecuting a common law action, until *after* a suit for compensation had been *filed and prosecuted to a final judgment.* T.C.A. §§50-1205, 50-1206; *Davis* v. *United States Fid. & Guar. Co.,* 206 Tenn. 683, 337 S.W.2d 240 (1960); *Hudgins* v. *Nashville Bridge Co.,* 172 Tenn. 580, 113 S.W.2d 738 (1938); *Shipley* v. *Wellwood Silk Throwing Mills,* 164 Tenn. 281, 47 S.W.2d 561 (1932). In this latter case, the Tennessee Supreme Court said, in construing § 50-1205 and § 50-1206 (formerly § 41 and § 42 of the Act):

> When the right of election exists, it is only the "institution of an action at law" that is to be deemed to be a waiver of the right to compensation. No reason is suggested for giving effect to an *extrajudicial* demand for compensation as a waiver of the right to sue at law, while denying similar effect to a similar demand for damages, and we

> do not think the Legislature intended to make such a distinction. (Emphasis added). *Id.* at 562.

The fact of the *voluntary* payments by Wood's Illinois carrier would therefore *not* be recognized in Tennessee, and the law and policy of Tennessee would not be in accord with the law of Illinois that workmen's compensation would be the exclusive remedy. According to the teaching of the cases of this Court, including *Carroll* v. *Lanza,* 349 U.S. 408; *Pacific Employers Ins. Co.* v. *Industrial Acc. Commission,* 306 U.S. 493; *Alaska Packers Ass'n* v. *Industrial Acc. Commission,* 294 U.S. 532; and this Court's recent pronouncement in *Crider* v. *Zurich Ins. Co.,* 85 S.Ct. 769 (1965), the Court of Appeals should apply Tennessee law which would allow this common law suit.

Having thus ignored the applicable Tennessee law and misapplied the "law and policy" of Tennessee and Illinois in its first opinion, the court was faced in its second opinion with the problem of extricating itself from the illogical corner into which it had written itself. At this point the court began counting employees of Wood and Stainless in order to determine if either had five employees working on this job, the statutory prerequisite to compliance with the Tennessee Workmen's Compensation Act. In searching the record to make the necessary count, the court determined that Wood had four men working for him in Tennessee, but refused to count Wood's wife in Illinois as an employee, even though she did all of his bookkeeping for him, since there was no showing that she was actually paid for her services. This point had not previously been an issue in the case and is properly a question for the jury, not for an appellate court. The court then considered whether Stainless had five em-

ployees in Tennessee, in order to determine if Stainless should have compiled with the act. To support this position, it was necessary for petitioner to establish that Wood and his men were employees of Stainless. The jury had previously determined, by virtue of the general verdict, that an employer-employee relationship in fact existed. The Court of Appeals, however, *reweighed* the evidence on this point and found that "these facts do not establish that the relationship of employer-employee existed between Stainless and Wood." (App. A. at 12a).

It is significant that the court did not hold that petitioner had failed to carry her "burden of proof" by failing to meet the "sufficient evidence" standard. In fact, the court again *substituted its opinion for that of the jury,* thereby depriving petitioner of her constitutional right to a jury trial, and in so doing, directly contravened the frequent admonitions of this Court and courts of appeals that such substitution is not within the province of an appellate court. (See cases cited *supra* at pp. 16-17.)

The question is not whether the Court of Appeals believed the employer-employee relationship was established—the jury had already determined this by way of general verdict. The question is whether there was "sufficient evidence" to go to the jury with the issue. In treating this question in its opinion denying rehearing, the Court of Appeals did not list all of the evidence (App. A. at 12a) upon which the jury could have based its determination. Nor did it make any reference to the Tennessee law governing submission of questions

to the jury, as enunciated in the Tennessee cases cited *supra* at p. 13. In addition to the evidence listed by the court, the jury could have based its determination upon the following record evidence:

> 1. Under Stainless' contract with Ferguson, Stainless was required to have a foreman or superintendent on the job; Ferguson's representative said that they looked to Wood as being such foreman (R. 165-75a); Wood had to be told what he would have to do because he had never seen the contract between Ferguson and Stainless (R. 239a); Wood was required, on the "advice" of Stainless, to hire a union man against his wishes (R. 234a); Wood's company was not allowed to complete the job but Stainless hired another company and completed the job through it, and Wood was in effect fired by Stainless. (R. 297-98a).
>
> 2. Stainless "Construction" Company was not in fact a construction company, but had to employ men such as Wood to erect the towers it sold (R. 276-78a; 300a); all correspondence between Wood and Stainless indicated that Stainless maintained a high degree of control over Wood (*e.g.*, R. 128-29a; 153a; 155a; 168-69a); Stainless did not require a performance bond of Wood (R. 231a); Stainless sent Wood a "construction order" covering the intended work (R. 151a; 163-64a); Wood had never installed automatic lighting and had to find out from Stainless how to do it. (R. 230a).

In his charge to the jury, the trial court correctly stated Tennesse law to the effect that an

> employer must show that he relinquished his right to control the employee, and that the latter did not

> have to take his orders and instructions from him. It is the right to control and not the extent to which that right is exercised that determines the relation. (R. 311-12a).

This charge was proper under *Rose & Co.* v. *Snyder,* 185 Tenn. 499, 206 S.W.2d 897 (1947). Further, the law of Tennessee is that the question of the relationship of employer-employee is ordinarily "one of fact." *Smart* v. *Embry,* 208 Tenn. 686, 348 S.W.2d 322 (1961). The question then becomes, could the jury have found, giving petitioner the benefit of every reasonable and fair inference to be drawn from the facts, that an employer-employee relationship existed between Wood and Stainless?[4] The trial court found this evidence sufficient to go to the jury; the Court of Appeals did not specifically find to the contrary, although the force and effect of its determination is such. The conclusion is inescapable that the Court of Appeals also usurped the jury's function on this issue and in so doing, deprived petitioner of her constitutionally-protected right to a jury trial. Clearly, on the basis of the evidence in the record the jury could have found

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[4] In this regard, it is interesting to note that Tennessee has in effect adopted the "nature of the work" test, described in 1 Larson, Workmen's Compensation Law, ¶45.10, in *Billings* v. *Dugger,* 362 S.W.2d 49 (1962). There a man who called himself a "builder" also subcontracted out almost all of his "building" work. The Tennessee Supreme Court held that an employee of a subcontractor could sue the "builder" for workmen's compensation benefits only, and could not sue him for damages as a third party, since defendant builder was in fact the employer of the plaintiff. One need only substitute the names of Stainless and Mooney for the parties in *Billings* to determine how the Tennessee Supreme Court would decide the question of the relationship of Stainless and Wood.

that Stainless retained the *right to control* Wood in his actions, or that the nature of Stainless' work was such that it would be treated as the employer of Wood. Placing the burden of proof on the issue of relinquishment of control on respondent, and giving petitioner the benefit of every fair and reasonable inference, it cannot fairly be said that this question of employer-employee relationship should not have gone to the jury.

In an apparent effort to circumvent the jury's finding and to support its own rationalization, the Court of Appeals stated that there was no "affirmative finding by the jury that Wood was an employee of Stainless." (App. A. at 13a). Then, by way of footnote, the court alluded to the fact that the jury, in reaching its general verdict, had returned to open court one hour prior to completing its deliberations and, when asked by the court if it had reached a verdict, announced that it had "reached a conclusion, a decision of the guilt of Stainless under number two charge [the negligence of Stainless in hiring an incompetent independent contractor] but have not been able to arrive at the amount of damages." (R. 338a). The court further stated that the general verdict "by no means establishes that the jury found Wood to be an employee of Stainless." (App. A. at 13a, n. 3).

Immediately after the statement by the foreman the trial judge stated:

> Well, you haven't reached a verdict. Now, gentlemen, the court does not ask you to give up any good faith opinion about the lawsuit, but the Court does request of you to exchange views, to exchange views on the matter in an effort to reach a verdict ... the Court will ask the jury to return for further deliberations and when you reach a verdict then

you may return and announce it in open court (R. 338-39a).

Counsel for respondent attempted to have the jury polled by asking each of the jury members upon which theory they had decided Stainless liable. The trial court refused this request. In its memorandum supporting its denial of the respondent's motion n.o.v. and in the alternative for a new trial, the trial judge characterized the issue as being the recurrent one of how far the trial court should go in protecting the privacy of the deliberations of the jury. The judge denied the motion because "courts do not favor public or private question of jurors as to the method used in reaching their verdict as such procedure could easily cause harassment and embarrassment." (R. 51a, citing cases.)

It is apparent that the Court of Appeals has by indirection made out precisely what the trial court would not allow respondent's counsel to do directly and has done so on the basis of pure conjecture as to what the jury actually determined. There is absolutely no showing that the jury returned its "verdict" upon either one or the other of the issues. The foreman's statement that they had reached a "conclusion, a decision" does not mean that they had reached a *verdict*. The court correctly instructed that they had not reached a *verdict* and returned them for further deliberation. Approximately one hour later they returned to the court room and in response to the judge's inquiry whether they had reached a "completed verdict" the foreman stated "we have." Upon being polled, each juror affirmatively indicated that the verdict announced was his verdict. It is well settled that there is in fact no verdict until a *completed verdict* has been reached:

"[T]he only verdict is that which the jury announces orally in court, and which alone is received and recorded as the jury's finding." *California Fruit Exchange* v. *Henry*, 89 F. Supp. 580 (W.D. Pa. 1950), *aff'd*, 184 F.2d 517 (3rd Cir. 1950).

The governing principle on the point was well stated in *Foster* v. *Moore-McCormack Lines, Inc.*, 131 F.2d 907 (2d Cir. 1942):

> Whether the jury carefully weighed the testimony in the light of the judge's instructions, of course, we do not know, and, indeed, are forbidden to inquire. There was a general verdict, and such a verdict 'throws its mantle of impenetrable darkness over the operations of the jury.' Appellant might have dissipated that darkness by asking, under Rule 49, . . . for a special verdict or for a general verdict accompanied by the jury's answers to interrogatories. *Id.* at 908.

In the instant case the respondent failed to make such request and thereby waived its right to such a procedure and should not now be heard to complain.

The ruling by the court below that there was no "affirmative finding by the jury that Wood was an employee of Stainless, the jury having returned a general verdict" (App. A. at 13a), is wholly unwarranted in view of the jury's subsequent deliberation after it first returned to open court, and substitutes conjecture and opinion of the Court of Appeals for the determination of the jury.

CONCLUSION

Wherefore, the petitioner prays that a writ of certiorari be granted.

Respectively submitted,

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APPENDIX A

NORMA MOONEY, *Plaintiff-Appellee,*

v.

STAINLESS, INC., and STAINLESS CONSTRUCTION COMPANY, *Defendants-Appellants.*

No. 15433.

United States Court of Appeals
Sixth Circuit.

July 13, 1964.

Rehearing Denied Nov. 12, 1964.

Before MILLER, CECIL and PHILLIPS, Circuit Judges.

HARRY PHILLIPS, Circuit Judge.

Defendants[1] have appealed from a $50,000 judgment based upon a jury verdict awarded to plaintiff for the wrongful death of her husband, Harold W. Mooney, at Oak Ridge, Tennessee, on March 10, 1961, where he was engaged in the erection of a tower. Jurisdiction is based upon diversity of citizenship.

The Atomic Energy Commission engaged the H. K. Ferguson Company, one of the prime contractors for the Commission at Oak Ridge, to furnish and erect at Oak Ridge three 150-foot steel towers for use in connection with some of the Commission's activities. Ferguson prepared the tower bases and solicited bids from others, including Stainless, Inc., for the fabrication and erection of the towers.

Defendants are Pennsylvania corporations, and have never domesticated to do business in Tennessee. Stain-

[1] The parties will be referred to in this opinion as they appeared in the District Court. Defendants sometimes will be referred to as "Stainless." The H. K. Ferguson Company will be referred to as "Ferguson."

less, Inc., confined its activities to the design and fabrication of towers, and the details of any work in the field were handled by Stainless Construction Company, which was operated as a division of Stainless, Inc. and shared the same offices. By agreement of the parties the two corporations have been treated as one defendant for the purposes of this litigation.

Stainless, Inc. initially submitted a bid to Ferguson in the amount of $4,500 for only the fabrication of the towers. Ferguson then requested a bid for both fabrication and erection. Stainless Construction Company thereupon obtained oral bids for the erection work from two tower erectors. William Wood, doing business as Central Illinois Tower Maintenance Company, a sole proprietorship, of Monticello, Illinois, proposed to do the erection work for $3,000, which was $1,575 lower than that of the other bidder. Stainless then submitted a bid of $9,430 to Ferguson for fabrication and erection. Ferguson accepted the bid and subcontracted the fabrication and erection of the towers to Stainless. Stainless fabricated the towers and engaged Wood to erect them for the amount of his bid.

Mooney, husband of plaintiff, was an employee of Wood and a resident of Illinois. Erection of two of the towers was completed without incident. Mooney was fatally injured during the erection of the top section of the third tower. At the time of the fatal accident Wood was operating a truck to which a block and tackle arrangement was attached so that the forward motion of the truck would hoist the section. Wood drove the truck forward, lifting the section into place, and Mooney climbed up the tower and secured the section with bolts. When Wood sought to back the truck so as to slacken the hoisting line and permit it to be disengaged, he allowed the truck to move forward, with the result that the line tightened and caused the top section of the tower to fall to the ground with Mooney, killing him instantly.

Wood had complied with the Illinois Workmen's Compensation law with respect to Mooney, and plaintiff has been receiving compensation benefits under this law.

Plaintiff filed this suit for damages against Stainless on two alternative theories: (1) that Wood was an employee of Stainless, and Stainless was chargeable with Wood's negligence under the doctrine of *respondeat superior;* and (2) that if Wood was an independent contractor, he was incompetent to erect towers and Stainless knew or should have known of his incompetence when it engaged him, and Stainless therefore was guilty of independent negligence. The District Judge submitted the case on both theories to the jury, which returned a general verdict for the plaintiff.

With respect to the first theory, Stainless contends that plaintiff is barred from recovering common law damages because she received workmen's compensation in Illinois. The Illinois statute provides that acceptance of compensation will bar a suit for damages against the employer. Ill.Rev.Stat. ch. 48, § 138.5(a). Under plaintiff's first theory it is contended that Stainless was the employer of Wood, and the negligence of Wood was imputed to Stainless as his employer. The plaintiff contends that under Carroll v. Lanza, 349 U.S. 408, 75 S.Ct. 804, 99 L.Ed. 1183, Tennessee need not give full faith and credit to the Illinois statute if it conflicts with Tennessee's own law and policy.

However much we may agree with this interpretation of Carroll v. Lanza, plaintiff's argument overlooks the fact that in the instant case there is no conflict between the policy of Illinois and Tennessee law in this respect. Both states provide that if an employee accepts workmen's compensation, this will be the exclusive remedy against the employer. Ill.Rev.Stat. ch. 48, § 138.5(a); T.C.A. § 50-908. At the same time, both states provide that receiving compensation will not bar common law suits for damages against third parties. Ill.Rev.Stat. ch. 48, § 138.5(b);

T.C.A. § 50-914. If Stainless was the employer of Wood, it follows that Stainless was not a "third party" within the meaning of either the Illinois statute or the Tennessee statute. Thus there is no problem of conflicts of law in this case and Carroll v. Lanza has no bearing on this issue. Tennessee, the forum state, would apply her own law. As said by Justice Frankfurter: "Conflict-of-law problems have a beguiling tendency to be made even more complicated than they are." Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 169, 67 S.Ct. 237, 243, 91 L.Ed. 162 (concurring opinion).

Tennessee, of course, would recognize the fact of recovery of compensation in Illinois. Tidwell v. Chattanooga Boiler & Tank Co., 163 Tenn. 420, 43 S.W.2d 221. As already pointed out, under Tennessee law the recovery of compensation is the exclusive remedy against the employer. From this it would seem to follow that plaintiff is precluded from suing on her first theory, because if Stainless was in legal effect an employer of Wood and therefore of the decedent, then plaintiff's recovery of workmen's compensation bars a common law suit for damages against the employer. Such a conclusion, in our opinion, gives effect to the law and policy of Tennessee. Therefore it was error to submit to the jury the theory that Stainless may have been liable as an employer of Wood under the doctrine of *respondeat superior*. cf. Adams v. Hercules Powder Co., 180 Tenn. 340, 175 S.W.2d 319, 151 A.L.R. 1352.

Under her second theory, plaintiff contended that Wood was an independent contractor. In such a case, Stainless would not be an employer but was a third party and, under Tennessee law, could be liable for common law damages. Bowaters Southern Paper Corp. v. Brown, 253 F.2d 631 (C.A. 6); Mahoney v. United States, 216 F.Supp. 523 (E.D. Tenn.).

Specifically, plaintiff alleged that Stainless was guilty of independent negligence in engaging an incompetent con-

tractor. This is one of the many exceptions carved out of the general rule that an employer will not be liable for acts of an independent contractor. This exception has been recognized in Tennessee. Jolly Motor Livery Corp. v. Allenberg, 188 Tenn. 452, 221 S.W.2d 513; Cash v. Casey-Hedges Co., 139 Tenn. 179, 201 S.W. 347; Powell v. Virginia Construction Co., 88 Tenn. 692, 13 S.W. 691. We do not find any Tennessee case, however, where a prime contractor has been held liable for independent negligence in engaging a subcontractor.

It is clear that Stainless cannot be held liable for independent negligence in engaging Wood as independent contractor upon the theory of Wood's incompetence unless it is established that Stainless either knew, or by the exercise of reasonable care might have ascertained, that Wood was not properly qualified to undertake the work. 27 Am.Jur. (Independent Contractors) 507. The fact that Wood subsequently was guilty of a negligent act causing the death of plaintiff's husband raises no presumption that Stainless was negligent in selecting him as a contractor. Matanuska Electric Association, Inc. v. Johnson, 386 P.2d 698 (Alaska); Strickland v. State, 13 Misc.2d 425, 177 N.Y. S.2d 983; Eger v. Helmar, 272 Mich. 513, 262 N.W. 298; Silveus v. Grossman, 307 Pa. 272, 161 A. 362; 27 Am.Jur. (Independent Contractors) 509.

The District Judge charged the jury that the burden was on plaintiff to prove that the defendant was guilty of negligence in engaging an incompetent contractor and that such negligence was the proximate cause of the accident and the resulting death. This fixing of the burden of proof would seem to be proper under the general rules of negligence. There is, however, some authority for the view that the employer has the burden of proving that he exercised due care in selecting a contractor, thus casting this as an affirmative defense. Annot., 8 A.L.R.2d 267, 269. Tennessee does not seem to have had occasion to pass on this question,

but, absent any indication to the contrary, we hold that the District Judge correctly followed Tennessee's general rule that, in negligence cases, the burden is on the plaintiff to show a breach of a duty. Union Ry. Co. v. Williams, 187 F.2d 489 (C.A. 6) cert. den. 342 U.S. 839, 72 S.Ct. 65, 96 L.Ed. 634; Memphis St. Ry. Co. v. Cavell, 135 Tenn. 462, 187 S.W. 179; Chattanooga-Dayton Bus Line v. Lynch, 6 Tenn. App. 470.

In attempting to carry her burden, plaintiff introduced evidence to the effect that Wood's principal previous experience had been as a mere employee and crew chief in the erection and maintenance of towers; that his bid for the contract was substantially lower than that of the other bidder; that his equipment was not as comprehensive as it might have been; and that he was engaged by long distance telephone. Plaintiff also relies upon Wood's own testimony to the effect that he knew only "vaguely" what the work required. This, plaintiff contends, was sufficient evidence of Wood's incompetence for submission of the case to the jury.

On the other hand, there was testimony that the spread between the bid of Wood and that of the other bidder was not so unusual in this business. While it is true that Wood previously had been an ironworker and crew chief in the erection and maintenance of towers, it is uncontradicted in this case that he had begun his own company as a sole proprietorship three years prior to the contract with Stainless. It was not shown what kind of contracts Wood had performed during these three years other than his own testimony that "I specialize in tower erection and maintenance." Neither was it shown that Wood had ever before, either as employee or as contractor, been involved in an accident. There is no showing of anything about the previous history of Wood that would have put Stainless on notice of any incompetence or unfitness on his part, no matter how complete an investigation might have been

made by Stainless in advance of engaging him. Though there is an intimation that Wood's equipment was not as extensive as might have been desirable, no evidence was offered by plaintiff as to what extent he was ill-equipped or under-equipped, or as to what minimum equipment is required in the performance of this type of contract.

In light of the above, we are of the opinion that plaintiff failed to carry her burden of proof, and there was not sufficient evidence of Wood's alleged incompetence to submit to the jury the question of whether Stainless was negligent in selecting him. For cases which reached this result, although on distinguishable facts, see, e.g. Majestic Realty Associates v. Toti Contracting Co., 54 N.J.Super. 419, 149 A.2d 288, aff'd, 30 N.J. 425, 153 A.2d 321; Moore v. Roberts, 93 S.W.2d 236 (Tex.Civ.App.).

Furthermore, we are not at all certain that Stainless could have been held liable in this case even if it had been shown that Wood was incompetent. Section 411 of the Restatement of Torts pertains to negligence in the selection of an independent contractor; comment b, under that section, reads as follows:

> "The employer of a negligently selected contractor is subject to liability under the rule stated in this Section for bodily harm caused by his failure to exercise reasonable care to select a competent contractor, but only for such bodily harm as is so caused. In order that the employer may be subject to liability it is, therefore, necessary that harm shall result from some quality in the contractor which made it negligent for the employer to entrust the work to him. Thus, if the incompetence of the contractor consists in his lack of skill and experience or of adequate equipment but not in any lack of attention or diligence in applying such experience and skill or using such equipment as he possesses, the employer is subject to liability for any harm caused by the contractor's lack of skill, ex-

perience or equipment but not for any harm caused solely by the contractor's inattention or negligence."

In the instant case, plaintiff attempted to prove Wood's incompetence by reason of his alleged lack of equipment and lack of experience as a contractor. Two of the three towers had been erected and completed in a satisfactory manner. The accident occurred during the erection of the third tower when Wood moved the truck forward instead of backward. The death of plaintiff's husband would seem to have been caused by lack of attention or diligence on the part of Wood in operating the truck, and in permitting it to move forward, rather than by lack of experience as a contractor or by insufficient equipment.[2] Thus, under the

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[2] The complaint describes the accident as follows:

"Plaintiff avers that this tower was caused to fall when the defendants used a pick-up truck to hoist the top section of said tower into position. After said section was in place, the pick-up truck was carelessly, recklessly and wrongfully operated in a grossly negligent manner by William Wood * * *, when he negligently moved said truck forward putting a sudden surge on the hoisting line, causing the rigging to create a two block condition at the top of the tower, resulting in a downward force and pull, causing the tower to break about 80 feet from the ground, which precipitated plaintiff's husband to the ground and killed him."

A committee of the Atomic Energy Commission which investigated the accident reported in part as follows:

"After the top section had been landed and bolted in place by Mooney and Shuler, the truck operator (Wood) attempted to back the towing truck up a hill on the access road in order to provide slack in the hoisting line so it could be disengaged from the truck. Because of the steep grade and the loose crushed stone surface of the road, the wheels of the truck spun, and the motor died, during the backing process. The motor was restarted and another effort was made to back up the truck, but it skidded and moved forward putting a sudden

rationale of the foregoing quotation from Restatement, Stainless would not have been liable for this particular accident under plaintiff's second theory.

In any event, we are of the opinion that the District Court erred in submitting to the jury the plaintiff's theory that Stainless was guilty of negligence in engaging an incompetent contractor and that there is no evidence to support the verdict on this theory. Earlier in this opinion, we have held that plaintiff's acceptance of workmen's compensation benefits barred her recovery of damages on the theory that Stainless was the employer of Wood.

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surge on the hoisting line. When this sudden force was applied, it resulted in a two block condition at the top of the tower causing an excess downward force and a direct lateral pull at the 4′ point on the tower where the snatch block was attached. The horizontal (approximately 4′) movement of the tower at this point caused a whipping action in the upper portions of the tower and resulted in partial failure just above the guy wires at the 40′ level and complete fracture at the 80′ level. The top 70′ of the tower broke off just above the guy wires at the 80′ level and fell to the ground carrying Shuler with it. He received serious injuries. Mooney was catapulted off the tower by the whip action of the top sections and was instantly killed when he fell to the ground."

An eye-witness described the accident in the following language:

"So he started backing up through these loose gravels. He backed up a few feet and went ahead just a little bit, then he backed up and he must have come back about eight or ten feet the second time, then he started ahead. Therefore, I don't know just what happened, but he just kept going and that tightened up the hoist line to the steel again and the tower began to sway.

* * *

"Whether his foot slipped off the brake or whether he hit the foot feed there which caused him to keep going, I couldn't say."

In view of this disposition of the case, it is not necessary to pass upon the other issues presented on this appeal.

The judgment of the District Court is reversed, and the case remanded with instructions to dismiss the complaint.

On Petition to Rehear

Plaintiff, Mrs. Mooney, has filed a petition to rehear, asserting that the opinion of this court is erroneous and should be reconsidered upon the following grounds:

(A) That neither Wood nor defendants made filings of certificates of workmen's compensation with the State of Tennessee. and therefore plaintiff could maintain a suit for wrongful death under the provisions of T.C.A. §§ 50-1205 and 50-1206, against defendants as employers who rejected the Act.

(B) That plaintiff received workmen's compensation benefits under the Illinois Workmen's Compensation Act in the form of voluntary payments, and not as a result of an award, and that, since she received these benefits without initiating an action under the Illinois statute and prosecuting it to final judgment, she is not precluded from maintaining this suit for wrongful death against Stainless upon the theory that the relationship of employer-employee existed between Stainless and Wood and that Stainless was liable for Wood's negligence under the doctrine of *respondeat superior.*

(C) That there was sufficient evidence in the record upon which the jury could have returned a verdict for plaintiff on her second theory; that is, if Wood was an independent contractor, he was incompetent to erect towers, that Stainless knew or should have known of his incompetence when it engaged him, and Stainless therefore was guilty of independent negligence.

All three of these arguments were considered by the court in disposing of the appeal and the third contention

was discussed in some detail in our opinion. The first two contentions were not considered to be of sufficient merit to require discussion. Because of the earnestness with which plaintiff reasserts these arguments in an able petition to rehear, we now proceed to set forth our reasons for considering them to be without merit.

(A) Wood was not required to file certificates of workmen's compensation with the State of Tennessee unless he was "using the services of not less than five (5) persons for pay." T.C.A. § 50-902. The burden of proof is upon the employee to establish that the employer "had the requisite number of employees to bring it within the application of the compensation statute." King v. Buckeye Cotton Oil Co., 155 Tenn. 491, 503, 296 S.W. 3, 7, 53 A.L.R. 1086.

The record shows that Wood brought only two employees from Illinois to Tennessee to work in erecting the towers in question, one of whom was Mooney, husband of plaintiff. He had complied with the workmen's compensation law of Illinois as to these two employees at all times material. He did not expect to have any other employees on this job. Thereafter, under pressure from a local labor union at Oak Ridge, and in order to avoid labor difficulties, Wood put two local union members on the job, one of whom was added to his payroll approximately one hour before the accident. Thus the record shows that Wood did not at any time have more than four employees in Tennessee. Plaintiff contends that Wood's wife, who kept his payroll records in Illinois, should also be treated as an employee, and that Wood therefore had the minimum of five employees prescribed by the Tennessee statute. There is no showing that the wife was paid for her bookkeeping services or that she was an employee of Wood within the contemplation of the Tennessee statute. We hold that, under the facts, Wood was not required to qualify under the Tennessee Workmen's Compensation Law.

In the alternative, it is urged that Stainless had five or more employees in Tennessee and, having failed to make filings of certificates of workmen's compensation under the Tennessee statute, it rejected the Act and was subject to be sued for the death of Mooney resulting from the negligence of Wood imputed to Stainless as his employer.

If plaintiff is to support her position that Stainless had five employees in Tennessee, it must be established that Stainless is to be treated as the employer of Wood's four employees and also that Wood was the employee of Stainless and not an independent contractor.

As to the status of Wood, the record shows that he was in the tower erection business and had his own employees, tools and equipment; that Wood bid against another tower erector to get the contract for the erection of the three towers at Oak Ridge; that the bid was for a lump sum and covered the complete erection job by the end of a stated period, with Wood to furnish all labor, tools and equipment necessary therefor; that although the job was to be performed in accordance with plans and specifications furnished by Stainless, and Stainless reserved the right to inspect the work as it progressed to see that it was being done ir accordance with the plans and specifications, it was left up to Wood to determine the method or methods which would be followed by him in doing the job; that Wood used his own employees, tools and equipment in performing the work; that he paid his employees and withheld income taxes and Social Security taxes from them; and that Stainless did not at any time seek to control Wood as to the details of the work, but rather looked to him only for the end result. These facts do not establish that the relationship of employer-employee existed between Stainless and Wood. Odom v. Sanford & Treadway, 156 Tenn. 202, 207, 299 S.W. 1045, 1046; Bowaters Southern Paper Co. v. Brown, 253 F.2d 631 (C.A. 6); Restatement, Law of Agency, § 220(2).

The trial judge submitted to the jury both theories of plaintiff, giving a thorough charge concerning Tennessee law as to the distinction between an employee and an independent contractor. There was no affirmative finding by the jury that Wood was an employee of Stainless, the jury having returned a general verdict.[3]

We therefore hold that plaintiff has not established that either Wood or Stainless had as many as five employees in Tennessee. It follows that neither of them was required to qualify under the Tennessee Workmen's Compensation Law. Therefore T.C.A. §§ 50-1205 and 50-1206, relied upon by plaintiff, have no application.

(B) On the issue of the "voluntariness" of the workmen's compensation payments received by plaintiff under the Illinois Workmen's Compensation Law, the parties entered into the following pre-trial conference stipulation:

> "That Wood had complied with the Workmen's Compensation Law of the State of Illinois as to Mooney at all times material and that the plaintiff, as Mooney's widow, was at the time this suit was instituted, and is now, receiving Workmen's Compensation benefits of $92.00 every two weeks by reason of said

[3] During the deliberations of the jury, it returned into open court of its own volition and, when asked by the Court if it had reached a verdict, announced that it had agreed on the "guilt" of Stainless "under number two charge" but was unable to agree on damages. The Court directed the jury to deliberate further, which it did, and after approximately one hour came back into open court, and returned a verdict for plaintiff in the sum of $50,000. Stainless contends that the "number two charge" was that portion of the charge of the Court setting forth plaintiff's second theory of negligence in engaging an incompetent contractor. While the District Court ruled that, under all the facts and circumstances, the jury returned a general verdict, this verdict by no means establishes that the jury found Wood to be an employee of Stainless.

compliance. (The plaintiff contends that she has not made claim to these benefits and that the payments are being made to her voluntarily by Wood's Workmen's Compensation insurance carrier. The defendants are not advised as to this contention of the plaintiff and hence make no stipulation with reference thereto.)"

While plaintiff testified that she did not make any claim for workmen's compensation, the record is not specific as to how these benefits came to be paid. Assuming that the payments were made to plaintiff by Wood's workmen's compensation carrier, without requiring plaintiff to institute an action and obtain an award therefor, we find no Tennessee decision holding that the "voluntariness" of payments of workmen's compensation accepted by a widow of a deceased employee authorizes the widow to accept and collect workmen's compensation and at the same time maintain a suit against the employer for wrongful death. Such an interpretation would discourage voluntary payments to employees and their surviving dependents, and impose upon the beneficiaries of the Workmen's Compensation Act the burden of instituting an action on every claim and pursuing it to final judgment. We do not believe the Tennessee courts would adopt such a distinction between "voluntary" and "involuntary" payments. Barbee v. Baker Car Company, 154 Tenn. 130, 289 S.W. 525. The decisions relied upon by plaintiff do not support her contention that a beneficiary can accept workmen's compensation payments, even though made "voluntarily," and thereafter maintain an action for common law negligence or wrongful death against the employer. Davis v. United States Fidelity & Guaranty Co., 206 Tenn. 683, 337 S.W.2d 240; Hudgins v. Nashville Bridge Co., 172 Tenn. 580, 113 S.W.2d 738; Shipley v. Wellwood Silk Throwing Mills, 164 Tenn. 281, 47 S.W.2d 561.

(C) Finally plaintiff complains that this court has erred by substituting its opinion for the opinion of the jury as to

where the preponderance of the evidence lay under her second theory of the case, "thereby depriving the plaintiff of her constitutional right of trial by jury of the evidentiary facts in this case." In making this contention plaintiff has misunderstood our holding on her second theory. We held that the burden of proof was upon plaintiff to establish that Stainless was negligent in engaging Wood as an independent contractor, rather than upon Stainless to establish that it exercised due care in selecting Wood as an independent contractor. We then proceeded to hold not only that plaintiff failed to carry her burden of proof, but that there was no evidence whatsover which could have supported a verdict of the jury on this theory, and that the District Court therefore erred in submitting plaintiff's second theory to the jury. In order to clarify our holding on this point, the first sentence in the sixth from the last paragraph of our original opinion is revised to read as follows: "In light of the above, we are of the opinion that there was not sufficient evidence of Wood's alleged incompetence to submit to the jury the question of whether Stainless was negligent in selecting him."

All other contentions submitted by plaintiff have been considered by the court and found to be without merit.

The petition for rehearing is denied.

APPENDIX B

Statutes Involved

TENNESSEE

50-902. *Definitions.*—In chapters 9 through 12 of this title, unless the context otherwise requires:

(a) "Employer" shall include any individual, firm, association or corporation, or the receiver, or trustee of the same, or the legal representative of a deceased employer, using the services of not less than five (5) persons for pay. If the employer is insured, it shall include his insurer, unless otherwise herein provided.

50-908. *Right to compensation exclusive.*—The rights and remedies herein granted to an employee subject to the Workmen's Compensation Law on account of personal injury or death by accident, including a minor whether lawfully or unlawfully employed, shall exclude all other rights and remedies of such employee, his personal representative, dependents, or next of kin, at common law or otherwise, on account of such injury or death. [Acts 1919, ch. 123, § 8; Shan. Supp., § 5608a157; Code 1932, § 6859; Acts 1961, ch. 184, § 2.]

50-914. Liability of third persons—Attorneys' fee and lien—Subrogation of employer—Lien of employer and credit on employer's liability—Limitation of actions—When the injury or death for which compensation is payable under the Workmen's Compensation Law was caused under circumstances creating a legal liability against some person other than the employer to pay damages, the injured workman, or his dependents, shall have the right to take compensation under such law, and such injured workman, or those to whom his right of action survives at law, may pursue his or their remedy by proper action in a court of competent jurisdiction against such other person. . . .

50-1205. *Compensation insurance to be maintained or proof of financial ability to pay claims furnished—Evi-*

dence of compliance, filing—Payment of premiums.—Every employer under and affected by the Workmen's Compensation Law (1) shall insure and keep insured his liability hereunder in some person or persons, association, organization, or corporation authorized to transact the business of workmen's compensation insurance in this state, or (2) shall furnish to the commissioner of insurance and banking satisfactory proof of his financial ability to pay all claims that may arise against him under such law and guarantee the payment of the same in the amount and manner and when due as provided for in such law. If the employer elects to pursue the latter course, the commissioner of insurance and banking shall, without discretion, require the deposit of an acceptable security or indemnity bond to secure the payment of compensation liability as may be incurred under such law. Said bond shall be conditioned to run directly for the benefit of the employees subject to the Workmen's Compensation Law and may be enforced by them directly in an action in their name. This chapter shall not apply to policies of insurance against loss from explosions of boilers or flywheels or other similar single catastrophe hazards.

Every employer accepting the provisions of the Workmen's Compensation Law shall file with the commissioner of labor, division of workmen's compensation, and annually thereafter, or as often as may be necessary under the ruling of said commissioner, evidence of his compliance with the provisions of this chapter relating to insurance or indemnity to employees. Violations of the foregoing provisions of this section shall be punishable under §§ 50-1210, 50-1211. Until the provisions of this section are complied with, the employer shall be liable to an employee either for compensation under the Workmen's Compensation Law or at law in the same manner as if the employer had refused to accept the provisions of this law, and in any suit brought by the employee against the employer the defense of contributory negligence, the fellow servants' rule, and assumption of the risk by the employee shall not be open to

or set up by the employer in any common law court in which such suit may be brought. Claim of compensation in such cases under the Workmen's Compensation Law shall be deemed a waiver of the right to proceed at law, and institution and prosecution to final judgment of an action at law shall be deemed a waiver of all claims to compensation hereunder. No agreement by any employee to pay any portion of the insurance premium paid by his employer shall be valid, and any employer who deducts any portion of such premium from the wages or salary of any employee entitled to the benefits of this law shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than one hundred dollars ($100) for each offense.

If at any time the said commissioner of insurance and banking deems the security or bond inadequate or unsafe, he shall require adequate bond or security, and upon default thereof, he shall so advise the commissioner of labor. It shall be the duty of the commissioner of insurance and banking and the commissioner of labor to interchange information as to matters of mutual interest under this law. [Acts 1919, ch. 123, § 41; impl. am. Acts 1923, ch. 7, §§ 2, 50; Shan. Supp., §3608a191; mod. Code 1932, § 6895; Acts 1941, ch. 90, § 11; mod. C. Supp. 1950, § 6895.]

50-1206. *Evidence of compliance to be filed—Penalty for refusal—Liability to employee in damages—Defenses.*—Every employer accepting the provisions of the Workmen's Compensation Law shall file with the commissioner of labor, division of workmen's compensation, on a form prescribed by the commissioner, annually, or as often as the commissioner in his discretion deems necessary, evidence of his compliance with the provisions of § 50-1205. If any such employer refuses or willfully neglects to comply with these provisions, he shall be punished by a fine of not less than ten dollars ($10.00) nor more than one hundred dollars ($100), and after such conviction shall be

subject to a fine of not less than one dollar ($1.00) nor more than ten dollars ($10.00) for each day of such refusal or neglect and until he shall comply with said provisions, and also such employer so refusing or neglecting to comply, then during the continuance of such refusal or neglect shall be liable to an injured employee either for compensation as provided in this law to be recovered in an action brought in a court of competent jurisdiction for that purpose, or for damages to be recovered as if this law had not been enacted, as such employee may elect; and in case suit for damages is brought instead of a suit to recover compensation under the provisions of the Workmen's Compensation Law, the employer, when sued, shall not be allowed to set up as defense to the action that the employee was guilty of contributory negligence, or that the injury was occasioned by the negligence of a fellow servant of the employee or that the employee had assumed the risk of the injury. Claim of compensation made under the Workmen's Compensation Law shall be deemed a waiver of the right to sue for damages, and the institution and prosecution to final judgment of a suit for damages shall be deemed a waiver of a right to claim compensation under this law. [Acts 1919, ch. 123, § 42; impl. am. Acts 1923, ch. 7, §§ 2, 50; Shan. Supp., § 3608a192; mod. Code 1932, § 6896.]

ILLINOIS REVISED STATUTES

§ 138.5 *Damages—Illegally employed minors—Third party liability*

(a) No common law or statutory right to recover damages from the employer or his employees for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives

of his estate, or any one otherwise entitled to recover damages for such injury. . . .

(b) Where the injury or death for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some person other than his employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act. In such case, however, if the action against such other person is brought by the injured employee or his personal representative and judgment is obtained and paid, or settlement is made with such other person, either with or without suit, then from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him to such employee or personal representative including amounts paid or to be paid pursuant to the provisions of paragraph (a) of Section 8 of this Act . . .

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 1052

NORMA MOONEY,
Petitioner,
v.
STAINLESS, INC., et al.,
Respondents.

BRIEF

Of Respondents in Reply to the Petition for a Writ of Certiorari.

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INDEX.

	Page
Statement of the case	1
Reasons for not granting the writ	2
I. General	2
II. Petitioner's first question	4
a. The Court of Appeals did use the Tennessee standard and it is the same as the Federal standard	4
b. The Court of Appeals correctly held that there is no substantial evidence to support the jury finding of independent negligence	6
III. Petitioner's second question	9
Conclusion	12

Cases Cited.

Carroll v. Lanza, 349 U. S. 408, 99 L. Ed. 1183	3
Erie R. Co. v. Tompkins, 304 U. S. 64	2
Improvement Co. v. Munson, 14 Wall. 442	6
Mutual Benefit Health, etc. Assn. v. Denton, 22 Tenn. App. 495, 124 S. W. 2d 278, cert. den. Feb. 4, 1939	6
Pogue v. The Great Atlantic & Pacific Tea Co., CCA—5, 242 F. 2d 575	6
Price v. Firestone Tire and Rubber Co., 321 F. 2d 725.	5
Royal Indemnity Co. v. Curtis, CCA—5, 256 F. 2d 329	6
Williams v. Daniels, 48 Tenn. App. 112, 344 S. W. 2d 555, cert. den. March 10, 1961	6

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OCTOBER TERM, 1964.

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BRIEF

Of Respondents in Reply to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE.

As noted at page ten of the petition, this case presents only sufficiency-of-the-evidence questions on two issues: (1) negligence of the respondent, and (2) whether the employer of petitioner's husband bore the relationship of employee or that of sub-contractor to the respondent. It does not, as the petitioner suggests, raise the question of whether a state or Federal standard should be applied, for here the standard of the state (Tennessee) and the Federal standard is the same. Any consideration of the sufficiency questions will require a review of all the proof

to determine whether any substantial evidence to support the jury's verdict in favor of the petitioner is to be found. The Court of Appeals found none. In our reply to the two specific questions presented we shall refer to certain portions of the record omitted from petitioner's statement.

REASONS FOR NOT GRANTING THE WRIT.

I.

General.

Before any detailed discussion of either of the questions is undertaken, it should be noted that each is of the when-are-you-going-to-stop-beating-your-wife variety. Thus, the first question asks in part whether the Court of Appeals erred in failing to apply the Tennessee standard to the sufficiency question in contravention of the rule of **Erie R. Co. v. Tompkins**, 304 U. S. 64. As will become apparent, the Court of Appeals did apply the Tennessee standard, and it is immaterial whether that standard or the Federal standard was applied because they are the same. And the second question asks in part whether the Court of Appeals erred in substituting its opinion for the verdict of the jury, when in fact it is apparent that the Court of Appeals did not do so but found that there was no substantial evidence to support the verdict. Also, the second question presupposes that if the record contained sufficient evidence to support a finding that an employer-employee relationship existed between the respondent[1] and its subcontractor, the petitioner would be permitted by the law of Tennessee to maintain what in effect is a common law action for damages brought by an employee against his employer while the employee is receiving workmen's compensation benefits as provided for him by his employer under the

[1] The respondents were treated as one defendant in this case and will be referred to as "respondent" here.

law of Illinois. The Court of Appeals agreed with the petitioner that under the holding of **Carroll v. Lanza**, 349 U. S. 408, 99 L. Ed. 1183, the law of Tennessee, where the injury occurred, and not Illinois law would govern the question. The Court of Appeals then held that the action would not be permitted under Tennessee law. The petitioner proceeds on the assumption that the latter holding is incorrect. While we believe that it is correct, we shall not discuss the holding but shall consider only the sufficiency of the evidence questions, because no other questions are presented to the Court by the petition. For the same reason, and although we do not agree with the petitioner, we shall refrain from replying to other criticisms of the action of the Court of Appeals which are contained in the petition but which are immaterial to the sufficiency of the evidence questions.

The petitioner contends that the Court should take the case for three reasons. The first is that it is important to the litigants. That is undoubtedly true, as it is true in every case which is tried in every court—state or Federal —in the land. And there is an element of sympathy in every personal injury case, and perhaps a feeling of injustice which is shared by every loser, as is touched upon in the petition; however, we must be mindful that both parties to a suit have and must continue to have equal rights at the bar. Secondly, the petitioner contends that the case is important to the Court and the entire Federal court system "because it might perhaps serve as a suitable vehicle for this Court to settle the question of what standard—state or Federal—is to be utilized in determining the sufficiency of the evidence to go to the jury where Federal jurisdiction is based upon diversity of citizenship." This cannot be a reason because the case does not involve such a question. Again, the standard of both jurisdictions is the same. Thirdly, the petitioner suggests that there has been an "erosion" of the jury-trial guaran-

tee of the Seventh Amendment, that too many jury verdicts have been set aside over the years on the ground of insufficiency of the evidence, and that the Court should use this case to "dam up this erosion." The petitioner thus suggests that the sufficiency of the evidence rule has been widely and substantially abused but does not come forward with facts or studies which would warrant such an indictment of our appellate courts.

II.

Petitioner's First Question.

The petitioner has worded this question so as to contend (a) that the Court of Appeals did not use the Tennessee sufficiency of the evidence standard and thus erred, and (b) that the Court of Appeals erred in finding that there is insufficient evidence to support the jury verdict that the respondent was guilty of independent negligence in engaging its subcontractor.

a.

The Court of Appeals Did Use the Tennessee Standard and It Is the Same as the Federal Standard.

The record demonstrates that the respondent and the petitioner proceeded both in the District Court and in the Court of Appeals on the theory that the Tennessee standard is applicable to the case. While neither party referred in either court to the Tennessee standard by name, they did, with one exception, acquiesce in the basic proposition that Tennessee law governed all issues, the exception being the respondent's contention that the Illinois Workmen's Compensation law was material in connection with the petitioner's theory that her husband's employer, the subcontractor, was not an independent contractor but an employee of the respondent. In charging

the jury on the independent contractor issue the District Court cited a Tennessee case, outlined the rules contained therein, and stated that the jury would decide the issue in accordance with those rules (R. 310a). Neither party objected. In the respondent's brief which was filed in the Court of Appeals, reference was made to Tennessee decisions on the question of whether a general verdict can stand in the face of an affirmative showing that the verdict is based on a theory which is not supported by substantial evidence (Appellant's Main Brief, p. 48). Also in its brief the respondent referred to the principles which are favorable to the petitioner under the sufficiency standard which has been used for many years in Tennessee (Appellant's Main Brief, p. 57), the principles being the same as those for which Tennessee cases are cited by the petitioner to this Court (Petition, p. 13). One of those cases was cited in the petitioner's brief in the Court of Appeals (Appellee's Main Brief, p. 31).

There is nothing in the opinions written by the Court of Appeals in disposing of the case which would indicate that it was not applying the Tennessee standard which the parties were following. The opinions evidence that it was. Thus, in discussing the sufficiency of the evidence to support the petitioner's independent negligence theory, the Court of Appeals cited Tennessee cases in agreeing with the District Court that the petitioner had the burden of proof (App. to petition, 6a).

In any event, the Tennessee sufficiency standard is the same as the Federal, so that the question of the applicability of one or the other is not involved. This was recognized by the Sixth Circuit in another case. (**Price v. Firestone Tire and Rubber Co.**, 321 F. 2d 725.) As pointed out by the petitioner, the Tennessee standard is that the appellate court does not review the evidence to determine where the preponderance lies, but only to determine whether there is any substantial evidence to support the verdict,

and in so doing it will take the strongest legitimate view of the evidence to uphold the verdict, will allow all reasonable inferences to be drawn therefrom, and will discard all evidence to the contrary. (See the cases cited at page 13 of the petition.) It might be added by way of explanation, however, that under the Tennessee standard a verdict cannot be based on conjecture and speculation, and that the scintilla rule does not obtain. (Williams v. Daniels, 48 Tenn. App. 112, 344 S. W. 2d 555, cert. den. March 10, 1961; Mutual Benefit Health, etc. Assn. v. Denton, 22 Tenn. App. 495, 124 S. W. 2d 278, cert. den. Feb. 4, 1939.) The Federal standard is the same (Improvement Co. v. Munson, 14 Wall. 442; Pogue v. The Great Atlantic & Pacific Tea Co., CCA—5, 242 F. 2d 575; Royal Indemnity Co. v. Curtis, CCA—5, 256 F. 2d 329), and it is to be noted that the petitioner does not claim that the Federal standard would be more favorable to her than the Tennessee standard.

b.

The Court of Appeals Correctly Held That There Is No Substantial Evidence to Support the Jury Finding of Independent Negligence.

There are two parts to the charge of independent negligence. The first is that the subcontractor, **at the time he was engaged by the respondent to erect the towers,** was incompetent to do the job. The second is that the respondent knew or should have known of the incompetence and was thus negligent in engaging the subcontractor.

There is no evidence of any accident or injury in which the subcontractor was involved other than the accident from which the instant case arose. The petitioner's husband had worked for the subcontractor in the tower erection and maintenance business over a period of one to one and one-half years, had worked on towers 1,000 feet or

more in height, and he was an expert in such work. A 150 foot tower such as that which was being erected when the accident occurred would be considered a small tower (R. 71a, 72a). At the time the subcontractor was engaged by the respondent, he did business as Central Illinois Tower Maintenance Company and specialized in tower erection and maintenance work (R. 194a). He had operated his company for approximately three years (R. 195a). Prior to going in business for himself, he had worked as an ironworker erecting and maintaining towers for others, including Tower Builders, Inc. of Angola, Indiana, Gardner Construction Company of Fort Wayne, Indiana, and Tower Service Company of Indianapolis, Indiana (R. 195a). He had also worked in a supervisory capacity in tower erection work (R. 260a). By way of equipment, he had three winch trucks, a pickup truck, and miscellaneous tools, rope, cable and block (R. 197a). After he started his own company, he had worked from two to as many as six or seven employees (R. 204a, 205a). At the time he solicited work from the respondent, he advised the respondent as to his experience and equipment (R. 197a, 259a).

All the evidence which pertains in any way to the question of the subcontractor's competence at the time he was engaged by the respondent thus refutes the charge of incompetence. The District Court correctly charged the jury that any negligence on the part of the subcontractor which resulted in the death of the petitioner's husband would be immaterial to the question of the subcontractor's competence at the time he was engaged by the respondent (R. 335a). The petitioner did not object to the charge. Evidence of such a single act of negligence would be insufficient to support an inference that the subcontractor was incompetent at the time the respondent engaged him. Even if the rule were to the contrary, and the single act of negligence could support an inference

of incompetence at the time of the engagement, then clearly it could not constitute substantial evidence to support the second essential part of the theory, for the respondent could hardly be charged with knowledge of something that had yet to occur.

As we understand the petitioner's argument it is that the evidence shows that the subcontractor did not have proper equipment to erect the towers at the time he was engaged. The petitioner does not suggest that there is any evidence of what equipment the subcontractor should have used on the job other than that he shouldn't have used a pickup truck and finished the job after the accident with a winch truck. He had three winch trucks when he was engaged, and so advised respondent (R. 197a).

It is interesting to note that in charging the jury the District Court included in its statement of the petitioner's theory on independent negligence that the respondent had a duty to investigate the subcontractor before engaging him (R. 360a). At the end of the charge, and in the absence of the jury, the respondent requested that the jury be charged that the respondent had no duty to make an investigation in the absence of facts which would cause a reasonable person to do so (R. 328a, 330a). The District Court did not thereafter give such a charge to the jury (R. 335a). In overruling the respondent's motion for judgment N. O. V. or in the alternative for a new trial, the District Court was apparently concerned with the question, for in the District Court's memorandum on the motion it is stated that certain additional language was charged on the point (R. 50a). If the District Court had so charged the jury, it might have helped counteract the previous statement that the respondent in effect had a duty to investigate in any event. Such a charge was not in fact given to the jury, however (R. 335a). The respondent was thus left in the eyes of the jury with a duty

to investigate regardless of the facts. It was clear in the record that the respondent, having every reason to believe that the subcontractor was competent, made no investigation. Given an unwarranted duty to investigate, and not having investigated, there is little wonder that the respondent was found liable. This question was raised on the appeal but was not reached by the Court of Appeals.

III.

Petitioner's Second Question.

With this question the petitioner contends that the Court of Appeals erred in not finding substantial evidence to support the petitioner's theory that the subcontractor was an employee of the respondent and not an independent contractor.

It would appear that the jury was also unable to find any substantial evidence to support the theory. Thus, as the Court of Appeals observed in a footnote to its opinion on the petitioner's petition to rehear (App. to petition to this Court, 13a), the jury at one point during deliberation returned into open court of its own volition and announced that it found the respondent liable on the theory of independent negligence but was unable to agree on damages (R. 338a). The District Court held that the later general verdict made it just as probable that liability was found by the jury on the theory that the subcontractor was an employee of the respondent. The Court of Appeals did not pass on the question.

The record shows beyond question that the subcontractor was an independent contractor and that the respondent did not and had no right to control him except as to the end result, that is, to erect the towers in accordance with the plans and specifications. The record shows that the

subcontractor was in the tower erection business and had his own employees, tools and equipment (R. 194a, 197a, 204a, 205a); that tower erection is a specialized business (R. 195a); that the subcontractor bid against another in the same business to erect the towers (R. 280a, 281a); that the bid was for a lump sum and covered the complete erection of the towers by the end of a stated period, with the subcontractor to furnish all labor, tools and equipment necessary for the job (R. 10a, 145a, 146a); that although the job was to be performed in accordance with plans and specifications furnished by the respondent, and the respondent reserved the right to inspect the work as it progressed to see that it was being done in accordance with the plans and specifications, it was left up to the subcontractor to determine the method or methods, of which there were several, which would be followed by him in erecting the towers (R. 157a, 266a); that the subcontractor used his own employees, tools and equipment in performing his contract, directed the details of the work and paid, and withheld income and social security taxes from his employees (R. 208a, 255a, 197a, 210a); and that the respondent at no time sought to control the subcontractor as to the details of his work but looked to him for an end result only (R. 266a, 301a, 302a, 229a, 230a).

The contentions of the petitioner in this respect do not withstand even the most cursory review. Thus, it is said that under the respondent's contract with Ferguson, the respondent was required to have a foreman or superintendent on the job. The petitioner's own witness, the head of Ferguson, testified that due to the small size of the job the requirement was waived (R. 133a, 134a). It is said that the subcontractor had to be told what to do because he had not seen the respondent's contract with Ferguson. The record shows that complete plans and specifications were furnished by the respondent to its subcontractor (R. 146a, 154a). It is said the subcontractor

on the "advice" of the respondent hired a union man against his wishes. The record on this point shows that the respondent simply passed on to the subcontractor information received from Ferguson that a local union would not permit the subcontractor to perform his contract unless he employed a union man; that the respondent "suggested if the prevailing conditions existed that way that it would probably be better if I did it, in order to keep the contract"; and that the subcontractor hired the union man (R. 233a, 234a, 268a). It is said that after the accident the respondent did not allow the subcontractor to complete his contract, engaged another tower company to finish the job, and thus "fired" the subcontractor. The statement is inaccurate. The record shows clearly that it was agreeable with the respondent for the subcontractor to complete the contract (R. 242a); that the subcontractor went home to Illinois to attend the deceased's funeral and while there made arrangements on his own with Tower Maintenance of Illinois, Inc., to complete the job (R. 243a); and that the latter agreed with the subcontractor to do the work for labor costs plus 20 percent (R. 250a). The petitioner asserts that the correspondence between the respondent and its subcontractor indicates a high degree of control. A review of the correspondence will disclose it indicates no control (R. 128a-130a; 153a-155a, 166a, 167a). It is said, correctly, that the respondent did not require a performance bond from its subcontractor. It is said that the paper which outlined the terms of the subcontract between the respondent and its subcontractor was headed "Construction Order" and not "Contract". While this is true the document would appear to be a classic example of an agreement between independent contractors (R. 145a-150a). Finally, the petitioner says that the subcontractor had never installed automatic lighting and had to find out from the respondent how to do it. The record shows that the information was supplied by means of plans (R. 154a).

CONCLUSION.

Wherefore, it is submitted that a writ of certiorari should not be granted.

Respectfully submitted,

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